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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.: 78-204

LOLA RABON,

Petitioner,

v.

GUARDSMARK, INC.,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
Argument	5
I. There Are No Special and Important Reasons Requiring This Court To Reinterpret the Law of the State of South Carolina	5
II. The Decision Below Is Clearly Correct	7
III. There Is No Conflict of Decision	12
Conclusion	15

TABLE OF CITATIONS

Cases	Page
Bagby v. *Merrill Lynch*, 491 F.2d 192 (8th Cir. 1974)	13
Belton v. *Richland Memorial Hospital*, 263 S.C. 446, 211 S.E.2d 241 (1975)	10
Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956)	14
Bishop v. *Wood*, 426 U.S. 341 (1976)	14
Broome v. *Truluck*, —— S.C. ——, 241 S.E.2d 739 (1978)	11
Brown v. *Anderson County Hospital Assoc.*, 268 S.C. 479, 234 S.E.2d 873 (1977)	10, 11
Buchanan v. *Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159 (1920)	9
Courtney v. *American Ry. Co.*, 120 S.C. 511, 113 S.E. 332 (1922)	8
Decker v. *Bishop of Charleston*, 247 S.C. 317, 147 S.E.2d 264 (1966)	10
D'Hedouville v. *Pioneer Hotel Co.*, 552 F.2d 866 (9th Cir. 1977)	13
Hatfield v. *Palles*, 537 F.2d 1245 (4th Cir. 1976)	9
Huddleston v. *Dwyer*, 322 U.S. 232 (1943)	7, 8
Jones v. *Atlantic Coastline Ry.*, 108 S.C. 217, 94 S.E. 490 (1917)	9
King v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948)	14
Lane v. *Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964)	8
Layne and Bowler Corp. v. *Western Well Workers, Inc.*, 261 U.S. 387 (1923)	7, 15
Lee Shops, Inc. v. *Schatten-Cyprus Co.*, 350 F.2d 12 (6th Cir. 1965); *cert. denied* 382 U.S. 980 (1966)	13
Lomartira v. *American Auto Ins. Co.*, 371 F.2d 550 (2nd Cir. 1967)	13
Magnum Co. v. *Coty*, 262 U.S. 159, 163 (1923)	5
Matheson v. *American Tel. & Tel. Co.*, 137 S.C. 227, 135 S.E. 36 (1922)	9

TABLE OF CITATIONS—Continued

	Page
O'Hagan v. *Fraternal Aid Union*, 144 S.C. 84, 141 S.E. 893 (1928)	10
Poliakoff v. *Shelton*, 193 S.C. 398, 8 S.E.2d 494 (1940)	9
Rice v. *Sioux City Cemetery*, 349 U.S. 70 (1955)	6, 15
Sade v. *Northern Natural Gas Co.*, 501 F.2d 1003 (10th Cir. 1974)	13
State of Spiegel v. *Commissioner*, 335 U.S. 701 (1948)	8
Vandenbark v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941)	7
Williams v. *Weyerhauser Co.*, 378 F.2d 7 (4th Cir. 1967)	13
Wisconsin Screw Co. v. *Fireman's Fund Ins. Co.*, 297 F.2d 697 (7th Cir. 1962)	13
Wren v. *New York Life Ins. Co.*, 493 F.2d 839 (5th Cir. 1974)	13

STATUTES

South Carolina Code Ann. §§ 40-17-10, -130 (1976)	9
Revised Rules of the *Supreme Court Practice* (4th Ed.)	5

OTHER AUTHORITIES

Stern & Gresham, *Supreme Court Practice* (4th Ed.)	8

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OPINIONS BELOW

The opinion of the District Court is unreported and appears as Appendix C of the Petition. The opinion of the Court of Appeals for the Fourth Circuit, and the dissenting opinion (Appendix A of the Petition) are reported at 571 F.2d 277 (4th Cir. 1978).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether, under the State law of South Carolina, Guardsmark, a security guard company, should be held

liable for the acts of rape committed by one of its employees regardless of whether the employee is acting within the course and scope of his employment.

STATEMENT OF THE CASE

This litigation concerns the activities of one isolated individual employee of Guardsmark, Inc. and his single aberrant act of rape. The case was heard in the District Court and by the Court of Appeals on a Stipulation of Fact. In that the Statement of Fact [1] submitted by the petitioner goes far beyond the Stipulation of Fact which was before the District Court and the Court of Appeals, it is necessary to briefly restate the Stipulation.

It has been stipulated for the purposes of this matter that Lola Rabon was employed by Hewitt-Robins, a division of Litton Industries, located at Highway 1, North, as a payroll clerk and was about her duties as such on January 19, 1975, a Sunday. Melvin Roberts was, that day, employed by Guardsmark as a security guard and assigned to Hewitt-Robins plant to provide protection for the plant and its employees. He was armed with a loaded .38 caliber pistol, for which he was duly licensed by the South Carolina Law Enforcement Division pursuant to his employment as a security guard with Palmetto Security Company, the predecessor to Guardsmark, Inc. The license was issued for a period of November 19, 1974, to November 19, 1975. Upon completion of her payroll duties on January 19, 1975, the petitioner, accompanied by her supervisor, the General Accounting Manager at Hewitt-Robins, prepared to depart from the plant. The petitioner was interrupted in her departure by the realization that she had forgotten

[1] The facts as stipulated to by petitioner and respondent were the only facts appropriately before the District Court when that court made its decision. The only facts properly before this court, then, are those in the Stipulation.

her car keys and returned to the office to pick up the forgotten keys. Her supervisor left the plant prior to the return of the petitioner from her trip to the office to pick up her car keys. Upon the departure of the supervisor, the Hewitt-Robins building was empty of all occupants other than the petitioner and the Guardsmark employee, Melvin Thomas Roberts. Roberts did forcibly assault and rape the petitioner at gun point on January 19, 1975, on the premises of the Hewitt-Robins plant after all other occupants had left the building.

The above paragraph constitutes a complete statement of facts with regard to the issues of liability before, first, the District Court and, second, the Fourth Circuit Court of Appeals. The petitioner goes beyond this record at every possible opportunity. For instance, petitioner suggests that Roberts was "dressed in his official uniform" (Petition, p. 2); that petitioner "returned to her office to lock up her desk"; that "as petitioner came out of her office, she was assaulted by the guard but managed to break away and run"; that "however, the guard informed her that she was his prisoner, he dangled keys in her face to the plant which had been issued to him pursuant to his employment." Obviously, petitioner seeks at this late stage of these proceedings to alter the facts which were submitted by stipulation for consideration in the lower courts. Respondent cannot agree to do so; this Court must make a determination based on the same Stipulation of Facts before the lower courts.

The District Court, as noted by the Court of Appeals, decided the issue of liability in an oral opinion. That opinion is little or no aid in analyzing the narrow issues of state law presented by this case. It contains no citations of authority except a passing reference to a case that can be identified only by reference to argument of counsel for Guardsmark. The Court of Appeals stated "that much of what the District Court said in its opinion

could be interpreted only by its colloquy with counsel prior to its discharge of the jury which had been impaneled to try the case and assess damages before it was known that the District Court would decide liability summarily and the parties would agree as to damages." In short, without citation of authority the District Court found that it would predict that the South Carolina Supreme Court, if faced with the facts of this case, would decide that regardless of whether or not the employee was acting within the course and scope of his employment, the employer would be liable for the acts of the employee.

The Court of Appeals, in a closely reasoned opinion, noted that the South Carolina courts had applied the plaintiff's theory of liability only in cases involving common carriers (including communications utilities which were defined as common carriers for purposes of liability under the 1895 Constitution of the State of South Carolina). The Court of Appeals further found that the fact that the South Carolina Legislature thought it desirable to license private security agencies indicated a recognition that their activities affected the public interest but "[o]ne cannot infer from that recognition an intention to impose on them a higher standard of civil liability than that to which ordinary business enterprises are held."

The majority of the Court of Appeals stated succintly:

> To Summarize: Plaintiff's right to recovery is barred by the operation of the rule of *respondeat superior* since the assault by Roberts was neither in the furtherance of Guardsmark's business nor within the scope of Roberts' employment. We do not think that this case may be treated as an exception to this rule existing under South Carolina precedents or statutes and we do not think that the South Carolina Supreme Court would reach a different conclusion. It follows that the judgement from which the appeal is taken is REVERSED. 571 F.2d at 1282.

ARGUMENT

The issue presented in this case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on *certiorari*. Here, we are concerned with an issue of interpretation of a state law of South Carolina covering the isolated aberrant act of one employee of one specific guard company. There is no federal question presented nor is the situation presented likely to occur again and again in the future so as to be of wide-spread public interest. On the individual facts presented by this case, the decision of the Court of Appeals was manifestly correct. There is no real conflict in decision presented and there is clearly no important question of federal law. To the contrary, this case presents only a question of interpretation of the common law and statutory law of the State of South Carolina.

I

THERE ARE NO SPECIAL AND IMPORTANT REASONS REQUIRING THIS COURT TO REINTERPRET THE LAW OF THE STATE OF SOUTH CAROLINA

This Court has recognized in Rule 19, Revised Rules of the Supreme Court, that there must be special and important reasons for granting the writ of certiorari. It is further necessary that the principal question involved be one of importance to the public as distinguished from that of the parties.[2] While this case is certainly

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[2] As stated by Chief Justice Taft in 1923 in *Magnum Co.* v. *Coty*, 262 U.S. 159, 163:

> The jurisdiction [of the Supreme Court to review cases by way of *certiorari*] was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for *certiorari* do not appreciate the necessary limitations upon our issue of the writ.

[Footnote continued on page 6]

important to the parties, as are all cases brought this far in the litigation process, the case at bar presents no such principal question of public interest. The question of liability of an employer for the intentional violent acts of a security guard is not a recurring one. It is of little interest to the general public. The paucity of cases dealing with the subject indicates that the question of such liability rarely arises, and has never arisen in South Carolina until the present case.

This Court was asked to review a narrow question involving the state law of Iowa in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955). There Justice Frankfurter, writing the majority opinion, dismissed the writ of certiorari as being improvidently granted. It was pointed out that had a State Statute of Iowa been properly brought to the court's attention, *certiorari* would not have been granted in the first instance, since it made the case one of "isolated significance," and that in such a situation a writ of certiorari may be dismissed even after full argument. Justice Frankfurter pointed out

[2] [Continued]
In 1949 in his address before the American Bar Association, Chief Justice Vinson likewise noted:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the constitutional convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights and uniformity of judgments." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass on questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the court. (69 S.Ct. v vi).

that the court does not sit for the benefit of particular litigants. "Special and important reasons," he noted, implied a reach to a problem beyond the "academic or episodic." Further, citing *Layne and Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923), Frankfurter points out that "it is very important we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." 349 U.S. at 79. The lack of general importance of this case, evidenced by the fact that this question has rarely arisen, indicates that this is not a question of pressing significance and that this Court should properly refuse the writ of certiorari.

II

THE DECISION BELOW IS CLEARLY CORRECT

The Court of Appeals has not decided an important state question in a way which conflicts with the State law of South Carolina; therefore, the writ of certiorari should be denied. Since the Court of Appeals correctly applied the South Carolina law as it existed at the time of its decision, there is no possible conflict with this Court's decision in *Vandenbark* v. *Owens Illinois Glass Co.*, 311 U.S. 538 (1941), which requires an appellate court in a diversity case to apply the state law as it exists at the time of the appellate decision. It is further clear from this Court's decision in *Huddleston* v. *Dwyer*, 322 U.S. 232 (1943) that the case at bar is not a proper case for review by this Court. In *Huddleston*, this Court stated "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by intermediate appellate

courts." [3] Also, as in *State of Spiegel* v. *Commissioner*, 335 U.S. 701-708 (1948), this Court should follow its general policy of leaving undisturbed a Court of Appeals' holding on a question of state law. With these policy decisions regarding the upholding of a Court of Appeals determination of state law coupled with the fact that the determination was correct in light of existing law, the writ of certiorari should be denied.

It is clear under South Carolina law that as a general rule the liability of a master for the tort of his servant arises only when the servant is acting about the master's business and not while he is acting outside the service in which he is employed. *Lane* v. *Modern Music*, 244 S.C. 299, 136 S.E.2d 713 (1964). Further, under South Carolina law, in order to hold a master liable for the tort of his servant, the servant must have been at the time engaged in the discharge of the duties entrusted to him in reference to the particular matter at hand. *Courtney* v. *American Ry. Co.*, 120 S.C. 511, 113 S.E. 332, 334 (1922). Certainly it is clear that the act of rape committed by the employee of Guardsmark was outside the course and scope of his employment and not in furtherance of his employer's business. At the time of committing the rape he could not have been engaged in the discharge of the duties entrusted to him by Guardsmark. Instead, the rape was the converse of those duties.

[3] Commenting, in part, on the *Huddleston* case, Stern and Gresham point out at page 165 of their book *Supreme Court Practice* (4th Ed.):

> It is the primary responsibility of state courts of last resort to construe provisions of state statutes and constitutions and to adjudge the validity of state statutes in light of state constitutions. The Supreme Court is accordingly hesitant, when the highest state court has not spoken, and spoken clearly, to construe state statutes and constitutions of doubtful meaning, or to hold that a state statute violates the state constitution. And this hesitation is apparent in the exercise of the court's discretion in granting or denying writs of certiorari to review decisions of federal courts of appeal alleged to be in conflict with applicable state law. The Court usually is reluctant to grant review of cases turning on state statutes or constitutions where state decisions on the issues are non-existent or are in confusion. Unless the court of appeals' decision can be shown to be clearly wrong, the Court in such circumstances refuses to add its conjecture to that of the court of appeals as to a matter which ultimately rests with the highest state court.

South Carolina law has recognized a limited exception to the general rule of *respondeat superior* in a number of common carrier cases noted by the Court of Appeals. *Jones* v. *Atlantic Coastline Ry.*, 108 S.C. 217, 94 S.E. 490 (1917); *Buchanan* v. *Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159 (1920); *Matheson* v. *American Tel. & Tel. Co.*, 137 S.C. 227, 135 S.E. 36 (1922). The Court of Appeals correctly noted that South Carolina, as do other jurisdictions, requires the highest degree of care from common carriers. *Poliakoff* v. *Shelton*, 193 S.C. 398, 8 S.E.2d 494 (1940).

Petitioner seeks to place Guardsmark in the same category as a common carrier with respect to liability to the public for unauthorized acts of its servants due to South Carolina's Private Detectives and Private Securities Agency Act, S. C. Code Ann. §§ 40-17-10, -130 (1976). The Court of Appeals correctly decided that the legislature had expressed no intention to impose a higher standard of care on security guard companies through the passage of this statute. The statute has no provisions with regard to liability. It is simply a licensing statute. A statute cannot be found to act in derogation of the well established common law of the State of South Carolina unless the legislature has clearly and unambiguously expressed its intention to abrogate the principles of the common law. *Hatfield* v. *Palles*, 537 F.2d 1245 (4th Cir. 1976). In the absence of such clear and unambiguous intent written into the language of this statute, it was clear error for the District Court to find that this licensing statute formed the basis for an expanded liability of security guard companies.

The Court of Appeals correctly determined that the courts of South Carolina had traditionally deferred to the legislature in changing such well established principles of common law as the Doctrine of *respondeat superior*. It was certainly correct in determining that the South Carolina Supreme Court would not readily expand the Doctrine of Common Carrier Liability imposing strict liability on non-common carrier employers. In *O'Hagan* v. *Faternal Aid Union*, 144 S.C. 84, 141 S.E. 893 (1928), the South Carolina Supreme Court stated that:

> Where there has been no legislative action, we must look back to the common law, for the principles of law stated there are of force in this State, until there has been some repeal or modification thereby by the law making body. 144 S.C. at 88.

Other cases cited by the Court of Appeals indicate this deference to the legislature. See, *Belton* v. *Richland Memorial Hospital*, 263 S.C. 446, 211 S.E.2d 241 (1975); *Decker* v. *Bishop of Charleston*, 247 S.C. 317, 147 S.E.2d 264 (1966).

The petitioner contends, erroneously, that the Court of Appeals erred in completely ignoring the case of *Brown* v. *Anderson County Hospital Assoc.*, 268 S.C. 479, 488, 234 S.E.2d 873 (1977), which made hospitals liable for reckless acts, thus, modifying slightly, in a very limited way, the Doctrine of Charitable Immunity. The Court of Appeals should not have considered this case in its determination of the law of South Carolina as regarding this matter because, first, the *Brown* decision specifically limits its holding to causes of action arising *after* May 10, 1977. The cause of action in the case at bar arose long before that date. The *Brown* decision by its own terms should therefore not have been considered in determining Guardsmark's liability. Second, the *Brown* case does not stand for the proposition that the South Carolina Supreme Court will no longer defer to the legislature in changing

matters of well established common law. Even if the Court of Appeals had referred in writing to this case, it would certainly have noted that the *Brown* court modified the established common law Doctrine of Charitable Immunity[4] only as to hospitals and only in cases of gross negligence. The South Carolina Supreme Court showed a desire to follow the established common law rule of charitable immunity in the case of churches, rescue missions, orphanages, etc. This very limited modification of the Doctrine of Charitable Immunity indicates, again, great reluctance of the courts of South Carolina to change the common law of this state in the absence of legislative action.

Petitioner also believes that the Court of Appeals ignored *Broome* v. *Truluck*, —— S.C. ——, 241 S.E.2d 739 (1978), which held a ten year limit on actions against persons deficiently designing an improvement in real estate was unconstitutional. The petitioner believes this case shows that the South Carolina courts give little deference to the legislature. That case involved a constitutional question in stark contrast to the present case which does not. The fact that the *Broome* court ruled the statute unconstitutional does not in any way mean a deference is not given to legislative decisions. Appellate courts are required at times to exercise their judicial power in finding a statute unconstitutional. But such an action does not destroy the express policy of the South Carolina

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[4] The petitioner suggests that the *Brown* case "virtually abolished the defense of charitable immunity to tort actions" because "evidence of negligence is evidence of willfulness for a jury's consideration." In support of this misstatement of the law of South Carolina, petitioner cites *Jowers* v. *Dupriest*, 249 S.C. 506, 154 S.E.2d 922, 948 (1967). The true holding of that case is "it is well established that the violation of an applicable statute . . . is evidence of recklessness and willfulness." 249 S.C. at 511. The *Jowers* case does not stand for the equation that negligence equals recklessness. The *Brown* case does not effectively abolish the defense of charitable immunity.

Supreme Court in giving deference to the legislature in matters involving changes of well established common law.

The policy of the South Carolina Supreme Court along with the policy decisions of this Court regarding the holding of the Court of Appeals' determination of the state law coupled with the fact that the determination was correct in light of existing South Carolina law compell a determination that the writ of certiorari should be denied.

III

THERE IS NO CONFLICT OF DECISION

The petitioner seeks to create from thin air the fabric of a conflict between the Courts of Appeal regarding the degree of deference to be accorded a district judge's determination of state law. By the clever use of semantics the petitioner conjures a conflict between the Second, Sixth, Seventh, Ninth and Tenth Circuits characterizing the practice of those courts as a so-called "majority rule" and the Fourth, Fifth and Eight Circuits as following a so-called "minority rule". It is clear that, in order to obtain a writ of certiorari, the petitioner is attempting to create a conflict where a conflict among the circuits does not exist.

Petitioner would have us believe that the Fourth Circuit by reversing the District Judge's opinion has violated a "majority" rule followed by the other circuits which requires strict adherence to the District Judge's opinion unless "clearly wrong" or "impermissible". (Petition, pp. 6, 7). This conflict does not exist. First, the Fourth Circuit does follow the majority "clearly wrong" rule. Second, the Court of Appeals in this matter implicitly found that the decision of the lower court was clearly wrong. Third, the District Court was clearly wrong. And, fourth, even if the District Court had not been clearly wrong, the nature of that court's opinion was such that it did not deserve great consideration.

The Fourth Circuit stated clearly in *Williams* v. *Weyerhauser Co.*, 378 F.2d 7, 8 (4th Cir. 1967), that in determining a question of state law significant weight should be given to the District Judge's opinion. Therefore the so-called "majority" rule has been approved and followed by the Fourth Circuit. Indeed, all circuits listed by petitioner defer to the District Judge's interpretation of state law, unless clearly incorrect.

However, none of the other Circuit Courts of Appeal referred to by petitioner require absolute adherence to a determination of state law by the District Judge, especially where he is clearly incorrect as in the present case. *See, Lomartira* v. *American Auto Ins. Co.*, 371 F.2d 550, 554 (2nd Cir. 1967); *Lee Shops, Inc.* v. *Schatten-Cyprus Co.*, 350 F.2d 12, 17 (6th Cir. 1965); *cert. den.*, 382 U.S. 980 (1966); *Wisconsin Screw Co.* v. *Fireman's Fund Ins. Co.*, 297 F.2d 697 (7th Cir. 1962); *D'Hedouville* v. *Pioneer Hotel Co.*, 552 F.2d 886, 895 (9th Cir. 1977); *Sade* v. *Northern Natural Gas Co.*, 501 F.2d 1003, 1005 (10th Cir. 1974); *Williams* v. *Weyerhauser Co., supra; Wren* v. *New York Life Ins. Co.*, 493 F.2d 839, 841 (5th Cir. 1974); *Bagby* v. *Merrill Lynch*, 491 F.2d 192 (8th Cir. 1974).

The Fourth Circuit Court of Appeals in its decision to reverse the District Judge did accord the correct degree of weight to his decision according to the standards of any and all other courts of appeal. The decision by the District Judge was, as previously noted, an oral opinion[5] completely devoid of sound legal reasoning or citation of precedent. His opinion presents no citation of authority

[5] Petitioner cites *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U.S. 188 (1939) for the proposition that "a ruling need not be written." In that case, the Circuit Court agreed with the ruling of the lower court.

from the South Carolina Supreme Court. The District Judge's opinion gave the Court of Appeals *no reason* for affording his decision any great weight due to his failure to refer in his decision to any sound basis in the South Carolina law. His decision, as noted above, was clearly an incorrect interpretation of the law of South Carolina.

This Court has recognized the authority of the Court of Appeals to reverse the District Court even where there are doubtful issues of state law. *King* v. *Order of United Commercial Travelers*, 333 U.S. 153 (1948). And even though this Court has recognized that special weight should be given to a federal judge's construction of state law, it, in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956), recognizes the Court of Appeals' ability to determine doubtful issues of state law. In that case, the District Court applied Vermont law while the Court of Appeals thought federal law should apply. In noting that Vermont law should apply, this Court stated there was no doubt regarding the law of Vermont, but, in case there were, "we would of course remand to the Court of Appeals to pass on the question of Vermont law." Furthermore, it should be noted as a matter of interest that sitting on the particular panel which reversed the District Judge was Judge Donald Russell. Judge Russell is a former South Carolina District Judge himself. Thus, the panel reviewing the case was quite familiar with the law of the State of South Carolina.

The petitioner cites *Bishop* v. *Wood*, 426 U.S. 341, 345-6 (1976) giving the impression that this Court requires adherence to the District Judge's determination of state law, "even if an examination of the state law issue without such guidance might have justified a different conclusion." In *Bishop, supra*, however, this Court made the aforementioned statement only after pointing out that *both* the District Judge and the Court of Appeals concurred in the examination of state law. This is in stark contrast to the case at hand.

This Court has stated that "it is very important that we be consistent in not granting the writ of certiorari except in cases . . . where there is a real and *embarrassing* conflict of opinion and authority between the Courts of Appeals." *Layne and Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923). This language was later approved by this Court in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955). It is clear that the case at bar presents no such conflict, and the writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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